



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 295 OF 2009

(IN THE MATTER OF THE ESTATE OF STEPHEN KANYI MUCHIRI (DECEASED))

CYRUS PETER KANYI.....PETITIONER

VERSUS

GEORGE GITONGA KANYI.....PROTESTOR

JUDGMENT

The petitioner and the protestor are the administrators of the estate of Stephen Kanyi Muchiri (deceased) who died domiciled in Kenya on 23rd April, 2007. The deceased was survived by his wife, his two sons who are the petitioner and the protestor herein and a daughter, Mary Wairimu Kairu.

The full inventory of assets listed in the affidavit in support of the petition as comprising the deceased's estate are the following:-

1. LR NO. AGUTHI/GITITU/203 (measuring approximately 7 acres)
2. LR NO. KABETE/KABETE/T.335 (measuring approximately 0.24 acres)
3. NGONG 1409 and NGONG 869 measuring approximately 10 acres
4. Nyeri Farmers Sacco Ltd shares
5. Tetu Housing Co-operative Society Ltd shares
6. Bank Account with Nyeri Farmers Sacco Ltd
7. Bank Account with Standard Chartered Bank, Nyeri Branch
8. Bank Account with Post Bank Ltd, Nyeri Branch.

By a summons dated 8th November, 2010 the petitioner sought to have the grant issued in their joint names, as administrators of the deceased's estate confirmed.

In the affidavit in support of the summons for confirmation of grant, the petitioner sought to have the deceased's estate distributed amongst his children. According to him, the deceased's wife is now deceased (she apparently died during the pendency of this cause) and therefore no provision has been made for her in the proposed distribution of the estate.

According to the petitioner, the estate should be distributed as follows:-

1. LR NO. KABETE/KABETE/T335 to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
2. LR NO. MAELA/NDABIBI BLK2/108 TABARATE to be shared between Cyrus Peter Kanja

- Kanyi and George Gitonga Kanyi in equal shares;
3. LR NO. NGONG/NGONG/869 to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
 4. LR. NO. NGONG/NGONG/23839 to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
 5. Shares in Nyeri Farmers Sacco Ltd to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
 6. Shares in Tetu Housing Co-operative Society Ltd to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
 7. Money in Nyeri Farmers Sacco Bank to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
 8. Money in Post Bank Account Nyeri to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
 9. Money in Standard Chartered Bank account, Kshs 10,000/= to be given to Mary Wairimu Kairu and the rest to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;

The protestor protested against the confirmation of the grant and in particular, opposed the distribution of the estate as proposed by the petitioner.

In his affidavit of protest which he swore on 20th July, 2011 and filed it in court on the same date, he has stated that the deceased had made his wishes known on how he wanted the estate to be distributed; he urged this court to respect those wishes in the distribution of the estate. According to him the estate should be distributed as follows:-

1. LR NO. KABETE/KABETE/T335 should be inherited by Regina Wanjiku Gitonga absolutely;
2. LR NO. MAELA/NDABIBI BLK2/108 TABARATE “should be inherited by George Gitonga Kanyi and sold to meet the expenses of the succession cause and the costs of subdivision of other properties;
3. LR NO. NGONG/NGONG/869 should be shared equally between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi.
4. LR. NO. NGONG/NGONG/1409 to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;
5. Shares in Nyeri Farmers Sacco Ltd to be inherited by Stephen Kanyi Gitonga;
6. Shares in Tetu Housing Co-operative Society Ltd to be inherited by Stephen Kanyi Kanja;
7. Money in Nyeri Farmers Sacco Bank to be inherited by George Gitonga Kanyi;
8. Money in Post Bank Account Nyeri to be inherited by George Gitonga Kanyi;
9. Money in Standard Chartered Bank account, to be inherited by George Gitonga Kanyi;

10. The deceased's semi-permanent house to be inherited by Stephen Kanyi Kanja.

Directions were taken to the effect that the protestor's protest will be determined through oral evidence. When the protest came up for hearing counsel for the respective parties informed the court they had agreed on certain issues and therefore need not dwell on them during the hearing; these issues as follows:-

1. The identity and the number of beneficiaries of the deceased's estate are:-

- i. George Gitonga Kanyi;
- ii. Cyrus Peter Kanyi Kanja; and
- iii. Mary Wairimu Kairu

2. The extent of the deceased's estate is as stated in the protestors affidavit of protest; according that affidavit the estate comprises the following assets:-

- i. LR NO. KABETE/KABETE/T335
- ii. LR NO. MAELA/NDABIBI BLK2/108 TABARATE
- iii. LR NO. NGONG/NGONG/869
- iv. LR NO. NGONG/NGONG/1409
- v. Shares in Nyeri Farmers Sacco Ltd
- vi. Shares in Tetu Housing Co-operative Society Ltd
- vii. Money in Nyeri Farmers Sacco Bank
- viii. Money in Post Bank Account Nyeri
- ix. Money in Standard Chartered Bank account
- x. The deceased's semi-permanent house

3. On distribution of the estate, they agreed as follows:-

- i. LR NO. NGONG/NGONG/869 should be shared equally between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi.
- ii. LR. NO. NGONG/NGONG/1409 to be shared between Cyrus Peter Kanja Kanyi and George Gitonga Kanyi in equal shares;

This court adopted their consent was as the order of the court and proceeded on that understanding. What was left for this court's determination, therefore, was the distribution of the rest of the estate comprising:-

- i. LR NO. KABETE/KABETE/T335
- ii. LR NO. MAELA/NDABIBI BLK2/108 TABARATE
- iii. Shares in Nyeri Farmers Sacco Ltd
- iv. Shares in Tetu Housing Co-operative Society Ltd
- v. Money in Nyeri Farmers Sacco Bank
- vi. Money in Post Bank Account Nyeri
- vii. Money in Standard Chartered Bank account
- viii. The deceased's semi-permanent house

It is the protestor's position that these properties should be shared out in accordance with the wishes of the deceased. The alleged wishes, according to the protestor were contained in a will which apparently the deceased died before signing.

My interpretation of the protestor's argument is that the deceased died intestate and without a will. In the absence of a valid will the distribution of the deceased's estate is subject to the intestacy provisions of the Law of Succession Act, and in particular **section 38** thereof; that section provides as follows:-

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if

there be only one, or be equally divided among the surviving children.

Section 41 referred to in this section deals with the holding of the property in a trust where it is to devolve upon a child. The beneficiaries in this case are all adults and therefore **section 41** of the Act is inapplicable in these circumstances.

Section 42, on the other hand, deals with property subject to appointment under **section 35**, advancements or *inter vivos* transfers or such property as is subject to an order for reasonable provision of a dependant who has not adequately been provided for under **section 26**. Such circumstances do not obtain with respect to the deceased's estate and therefore **section 42** of the Act does not also apply in this case.

Section 38 of the Act is clear and I need not belabour the point that apart from what has been agreed upon, the deceased's estate should be divided and shared equally amongst *all* his children. I have noted apart from proposing to give Mary Wairimu Kairu Kshs 10,000/= out of the entire estate, she has been left out in the distribution of the rest of the estate. I also note that although she did not participate in these proceedings, Mary Wairimu Kairu is acknowledged as one of the deceased's children and a beneficiary of his estate; in distributing the estate, this court is minded that under **section 38** of the Act, Mary Wairimu Kairu is entitled to a share of her father's estate as much as her brothers. It is also worth noting that though she did not participate in these proceedings, there is no evidence, and none of the parties suggested, that she ever renounced her right to inheritance. If she is not interested in the estate, she is of course at liberty to transfer her share to her brothers or to any of them or in any other way deal with her share as she deems fit. What this court cannot do is to proceed on the assumption that she is not interested in the estate without any evidence to that effect; it must be seen to have, as much as possible, complied with the law of the land with regard to distribution of the deceased's estate.

Accordingly, I am of the humble view that the deceased's estate should be distributed and shared out as follows:-

1. **LR NO. KABETE/KABETE/T335** shall be divided and transferred absolutely in equal shares to:
 - i. George Gitonga Kanyi;
 - ii. Cyrus Peter Kanyi Kanja; and
 - iii. Mary Wairimu Kairu.

2. **LR NO. MAELA/NDABIBI BLK2/108 TABARATE** shall be divided and transferred absolutely in equal shares to:
 - i. George Gitonga Kanyi;
 - ii. Cyrus Peter Kanyi Kanja; and
 - iii. Mary Wairimu Kairu.

3. **LR NO. NGONG/NGONG/869** to be divided and transferred absolutely in equal shares to:-
 - i. Cyrus Peter Kanja Kanyi
 - ii. George Gitonga Kanyi;

4. **LR NO. NGONG/NGONG/1409** to be divided and transferred absolutely in equal shares to:-
 - iii. Cyrus Peter Kanja Kanyi
 - iv. George Gitonga Kanyi;

5. Shares in Nyeri Farmers Sacco Ltd to be transferred in equal shares to:-
 - i. George Gitonga Kanyi;
 - ii. Cyrus Peter Kanyi Kanja; and

iii. Mary Wairimu Kairu.

6. Shares in Tetu Housing Co-operative Society Ltd to be transferred in equal shares to:-

- i. George Gitonga Kanyi
- ii. Cyrus Peter Kanyi Kanja; and
- iii. Mary Wairimu Kairu.

7. Money in Nyeri Farmers Sacco Bank to shared equally among:-

- i. Gitonga Kanyi;
- ii. Cyrus Peter Kanyi Kanja; and
- iii. Mary Wairimu Kairu.

8. Money in Post Bank Account, Nyeri to shared equally among:-

- i. Gitonga Kanyi;
- ii. Cyrus Peter Kanyi Kanja; and
- iii. Mary Wairimu Kairu.

9. Money in Standard Chartered Bank account to be shared equally among:-

- i. Gitonga Kanyi;
- ii. Cyrus Peter Kanyi Kanja; and
- iii. Mary Wairimu Kairu.

As for the deceased's semi-permanent house, the petitioner deposed that it is an old mud house that in his view is almost valueless; he had no problem with the protestor getting it. I would give to the protestor, for whatever it is worth.

In conclusion, the summons for confirmation of grant dated 8th November, 2010 shall be confirmed in the forgoing terms; to the extent that the protest is inconsistent with any of those terms, it is dismissed. Being a family affair, each party shall bear its costs. It is so ordered.

Signed, dated and delivered in open court this 14th day of December, 2015

Ngaah Jairus

JUDGE